STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2003
v	No. 239700 Genesee Circuit Court
ERIC JONATHON LATIMER, Defendant-Appellant.	LC No. 01-007407-FC

Before: Griffin, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), safe breaking, MCL 750.531, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment without parole for the first-degree murder and safe breaking convictions, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

It is undisputed in this case that on July 24, 2000, defendant, then sixteen years old, murdered his adopted father, Steven Latimer. Defendant broke into a safe at Latimer's house, stole guns and knives contained in the safe, cut the phone lines at the house, waited for his father to arrive, and then shot him repeatedly at close range with one of the guns and cut his throat. Defendant took an ATM card and a small sum of money from the victim's wallet and fled the scene in his father's van. Defendant was apprehended a few hours later and gave a detailed statement to the police, in which he admitted killing his father.

Defendant was charged as an adult and, prior to his trial in circuit court, he filed a motion to suppress his confession based on the claim that he was incompetent to waive his *Miranda*[1] rights. The trial court conducted a *Walker* hearing[2] and denied defendant's motion.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

Consequently, a written transcript and audiotape of the confession were admitted during the trial. At trial, defendant did not repudiate that he killed his father and broke into the safe; rather, the defense argued that it was not a premeditated killing and therefore defendant was guilty only of second-degree murder. However, the jury ultimately found defendant guilty as charged of first-degree premeditated murder, felony murder, safe breaking, and felony-firearm. Defendant now appeals.

The primary issue on appeal is whether the trial court erred in denying defendant's pretrial motion to suppress his confession. As was argued before the trial court, appellate counsel now argues that in light of defendant's age, intellectual limitations, and developmental disability, he could not and did not understand the consequences of waiving his *Miranda* rights. Moreover, defendant maintains that the police did not comply with the statute (MCL 764.27) and court rule (MCR 5.934) governing the arrest, interrogation, and custody of arrested juveniles, and there was no parent, guardian, or custodian present during his interrogation; therefore, under the totality of the circumstances, defendant's statement was involuntarily made and improperly admitted at trial.

In reviewing a trial court's grant or denial of a motion to suppress, we review the entire record de novo, but will not disturb a trial court's factual findings regarding whether the waiver of *Miranda* rights was voluntary, knowing, and intelligent unless that ruling was clearly erroneous. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000); *In re SLL*, 246 Mich App 204, 208-209; 631 NW2d 775 (2001). Clear error exists when we are left with a definite and firm conviction that a mistake has been made. *In re SLL, supra* at 208-209.

The statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights. *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). The issue whether a suspect's waiver of *Miranda* rights was voluntary and whether an otherwise voluntary waiver was knowingly and intelligently made constitute two separate prongs of the inquiry regarding the validity of a *Miranda* rights waiver. *Daoud, supra* at 635-639. Both prongs are analyzed objectively under the totality of the circumstances. *Abraham, supra* at 645. In general, whether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion. *Daoud, supra* at 635. In contrast, the determination "whether a suspect's waiver was knowing and intelligent requires an inquiry into the suspect's level of understanding, irrespective of police behavior." *Id*. at 636. A knowing waiver of *Miranda* rights does not require that the suspect understand the ramifications and consequences of choosing to exercise or waive those rights that the police have properly explained to him. *Id*., citing *People v Cheatham*, 453 Mich 1, 28; 551 NW2d 355 (1996). Rather, "a very basic understanding" – whether the defendant understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him – is all that is required for a valid waiver. *Id*. at 642, 643-644.

As explained by this Court in *In re SLL*, *supra* at 209, factors to be considered in determining whether a juvenile's confession is admissible include the following:

> (1) whether the requirements of *Miranda* . . . have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with MCL 764.27 . . . and the juvenile court rules, (3) the presence of

> an adult parent, custodian or guardian, (4) the juvenile defendant's personal background, (5) the accused's age, education, and intelligence level, (6) the extent of the defendant's prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention." [(*People v*) *Givans*, *supra* [227 Mich App 113; 575 NW2d 84 (1997)] at 121, citing *People v Good*, 186 Mich App 180, 189; 463 NW2d 213 (1990).]

A statement obtained in violation of MCL 764.27 and MCR 5.934 does not mandate automatic suppression because of the violation. *Good*, *supra* at 187. Instead, such a violation is considered as one part of the totality of the circumstances to determine whether the statement was voluntary. *Id*. See also *In re SLL*, *supra* at 209.

In the instant case, the record indicates that defendant was adopted at the age of seven by Steven and Tina Latimer. Mr. and Mrs. Latimer divorced when defendant was approximately thirteen years old. Defendant moved from one parent to the other over the course of the next few years. Defendant had behavioral problems at home and at school. He was described by various mental health professionals as "borderline retarded," as suffering from a "learning disorder," and as having a "developmental disability." His IQ was in the low normal range. Before the murder, defendant had been hospitalized at the Havenwyck psychiatric facility.

At the time of his arrest for the murder of Steven Latimer, Genesee County sheriff's deputies transported defendant to the police station and held him there until Tina Latimer arrived. The county police officers wished to interrogate defendant and asked Tina Latimer to attend the interrogation. The detective in charge of defendant's interview testified at the *Walker* hearing that he advised Tina Latimer that defendant would probably be charged as an adult for open murder and a possible life sentence. She signed a *Miranda* form but, being too distraught upon learning that her ex-husband had been killed, declined to participate and gave permission for defendant's uncle (her brother-in-law), Harvey Wilson, to sit with defendant during the interrogation in her stead. The *Walker* hearing record indicates that Wilson was present during the entire interrogation. When the detective read defendant his *Miranda* rights in Wilson's presence, Wilson signed and initialed the advice of rights form along with defendant. The detective testified that he advised Wilson that he could stop the interview at any time. Wilson assured the detective that he would protect defendant's rights.

The detective testified that defendant spoke to the him clearly and gave no indication that he had a below average intellect, although the detective noted that defendant could not spell his first name. During the interview, defendant assured the detective that he had not taken any illegal drugs since their prior meeting on June 9, 2000, when the detective interviewed defendant regarding defendant's involvement in a car theft. The detective testified that during this previous encounter, he advised defendant of his *Miranda* rights and he believed that defendant had no difficulty understanding them. The detective testified that at the time of the interview in the instant case, he had "no inkling" that defendant had a below average intellect or any mental health problems. The detective testified that defendant's demeanor was very calm, "like we're having a conversation about a ball game." He asserted that he and defendant always understood each other and defendant's answers were responsive. Defendant's handcuffs were removed

before the interview. The detective testified that he accommodated all of defendant's personal needs and even provided him with a meal.

Two experts, both psychologists, testified for the respective parties at the *Walker* hearing concerning defendant's competency to waive his *Miranda* rights. Both experts had interviewed defendant to evaluate his competency in this regard. The prosecution's expert witness opined that although defendant had a learning disorder, he was competent to waive his *Miranda* rights. She significantly testified that when her questions to defendant became uncomfortable to him, he would refer her to his lawyer and not answer. The defense expert concluded that in light of defendant's age and intellectual limitations, defendant was not competent to waive his *Miranda* rights; the expert based his opinion on defendant's expressed belief that the police would release him if he gave a statement without consulting with an attorney. Defendant apparently had plans to flee to Arkansas and wanted the police to release him as soon as possible so that he could effectuate his escape. The defense expert acknowledged that defendant understood that he did not have to say anything to the police, that he could have a lawyer, that he could stop the questioning at any time, and that his statement could be used against him at a later trial.

Based on the above testimony and after listening to defendant's taped statement, the trial court denied defendant's motion to suppress his confession. The court found that although the testimony indicated that defendant did not understand the consequences of waiving his right to have an attorney present, both expert witnesses essentially agreed that defendant understood the basic tenets of his *Miranda* rights. *Daoud, supra*. The court concluded that defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights.

We find no clear error in the trial court's factual findings and conclude that the trial court properly denied defendant's motion to suppress his confession. The record is devoid of evidence suggesting that the nature of the interview process was coercive or that defendant's statement was involuntarily rendered. Although MCL 764.27 and MCR 5.934 were violated, as previously noted such a violation is considered as part of the totality of the circumstances to determine whether the statement was voluntary. *Good, supra*. The evidence indicates that defendant's uncle, albeit not a blood relative, was present during the entire interview, that defendant had previous experience with the police, and that defendant was advised of his *Miranda* rights, stated that he understood them, and waived them. Defendant's statement was recorded, the interview was not unduly prolonged, and defendant's needs and wants were accommodated. Defendant does not claim to have been intoxicated, in ill health, threatened or deprived of food, medical attention, or sleep. Further, there is no evidence that defendant's intelligence level or personal background impeded his understanding of his *Miranda* rights. In sum, considering the totality of the circumstances and giving deference to the trial court's findings at the suppression hearing, *In re SLL, supra* at 208, we conclude that the trial court did not clearly err in finding that defendant's statement to the police was voluntary.

Moreover, as the trial court accurately noted, it is not necessary that a suspect understand the ramifications and consequences of choosing to exercise or waive those rights that the police have properly explained to him in order to effectuate a knowing waiver of *Miranda* rights. *Daoud, supra*. In this case, defendant may not have understood the consequences of waiving his right to the presence of counsel – he believed that if he did not call a lawyer, he could make his statement and be released, and that if he did call the lawyer, it would cause him to be incarcerated until trial, thereby foreclosing his plan to flee to Arkansas. However, the evidence

of record clearly established that defendant did understand that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him. *Daoud, supra*.

We therefore conclude that defendant's statement was voluntarily, knowingly, and intelligently made and, thus, was properly admitted at trial.

Defendant next argues that his two convictions of first-degree premeditated murder and first-degree felony murder, both based on the death of a single victim, violate the constitutional prohibition against double jeopardy, US Const, Am V; Const 1963, art 1, § 15. However, any violation of double jeopardy principles has been remedied and rendered moot by the trial court's order dated October 22, 2002, modifying the judgment of conviction and sentence to specify a single conviction of first-degree murder supported by two theories: felony murder and premeditated murder. See *People v Bigelow*, 225 Mich App 806; 571 NW2d 520 (1997), vacated 225 Mich App 806 (1997), reinstated in part 229 Mich App 218, 220-222; 581 NW2d 744 (1998). See also *People v Long*, 246 Mich App 582; 633 NW2d 843 (2001); *People v Adams*, 245 Mich App 226, 241-242; 627 NW2d 623 (2001); *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000).

Defendant's reliance on *Bigelow, supra,* to also argue that his conviction for safe breaking must be vacated on double jeopardy grounds, is without merit. In *Bigelow*, this Court vacated a conviction for breaking and entering because it served as the predicate felony for the charge of felony murder. It is well established that convictions and sentencing for both felony murder and the predicate felony constitute multiple punishments for the predicate felony and thus violate double jeopardy protections guaranteed by the Michigan Constitution, *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001); *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996), and that the appropriate remedy for this violation is to vacate the conviction and sentence for the underlying felony. *Adams, supra* at 242; *Bigelow, supra; Gimotty, supra*. However, in the instant case, a review of the felony information and the trial record indicates that larceny, not safe breaking, served as the predicate felony for the charge of felony murder. Indeed, safe breaking is not among the enumerated predicate felonies under MCL 750.316(1)(b). Accordingly, no double jeopardy violation has occurred and defendant's argument in this regard is without merit.

Affirmed.

/s/ Richard Allen Griffin
/s/ William B. Murphy
/s/ Kathleen Jansen